

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|---|---|------------|
| |) | CSR 8399-E |
| |) | CSR 8400-E |
| |) | CSR 8401-E |
| |) | CSR 8402-E |
| In the Matter of |) | CSR 8403-E |
| |) | CSR 8404-E |
| Bresnan Communications, LLC |) | CSR 8405-E |
| |) | CSR 8406-E |
| Petition for Determination of Effective |) | CSR 8407-E |
| Competition in Communities in Colorado, |) | CSR 8408-E |
| Montana, and Wyoming |) | CSR 8409-E |
| |) | CSR 8410-E |
| |) | CSR 8412-E |
| |) | CSR 8413-E |
| |) | CSR 8414-E |

MEMORANDUM OPINION AND ORDER

Adopted: April 21, 2011

Released: April 22, 2011

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Bresnan Communications, LLC (“Bresnan”), has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that Bresnan is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as the “Communities.” Bresnan alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”), and, in Bozeman, Montana, by LightNex Communications, Inc. (“LightNex”).³ The petition is unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ Bresnan states that its rates are not regulated in any of the Communities and that it is seeking formal exemption from the beginning of regulation under current conditions. Petition at 3 n.2.

⁴ 47 C.F.R. § 76.906.

⁵ See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

within the relevant franchise area.⁶ For the reasons set forth below, we grant the petition based on our finding that Bresnan is subject to effective competition in the Communities listed on Attachment A.

II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPDs”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁷ This test is referred to as the “competing provider” test.

4. The first part of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁸ It is undisputed that the Communities are “served by” both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Bresnan or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.⁹ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹⁰ We further find that Bresnan has provided sufficient evidence of DBS advertising in local and regional media that serve the Communities to support its assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.¹¹ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹² and is supported in this petition with copies of channel lineups for both DIRECTV and DISH.¹³ Also undisputed is Bresnan’s assertion that both DIRECTV and DISH offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹⁴ Accordingly, we find that the first part of the competing provider test is satisfied.

5. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Bresnan asserts that in some Communities it is the largest MVPD and in others one of the other MVPD providers is the largest and the combined household share of Bresnan and the other MVPDs exceeds 15 percent.¹⁵ The Commission has recognized that in those conditions, whichever MVPD is the

⁶ See 47 C.F.R. §§ 76.906-907(b).

⁷ 47 U.S.C. § 543(l)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

⁸ 47 C.F.R. § 76.905(b)(2)(i).

⁹ See Petition at 3.

¹⁰ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹¹ 47 C.F.R. § 76.905(e)(2).

¹² See 47 C.F.R. § 76.905(g). See also Petition at 6.

¹³ See Petition at Exh. 4.

¹⁴ See Petition at 3.

¹⁵ Petition at 7 & Exh. 1 (Declaration of Paul Jamieson, Managing Counsel, Legislative & Regulatory, Cablevision Systems Corp. (an affiliate of Bresnan), dated Jan. 26, 2011) at ¶ 4.

largest, the remaining competitors have subscribership of over 15 percent.¹⁶ Bresnan sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code plus four basis.¹⁷

6. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁸ as reflected in Attachment A, we find that Bresnan has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second part of the competing provider test is satisfied for each of the Communities. Based on the foregoing, we conclude that Bresnan has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Bresnan is subject to effective competition in the Communities listed on Attachment A.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Bresnan Communications, LLC, **IS GRANTED**.

8. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
Senior Deputy Chief, Policy Division, Media Bureau

¹⁶ If Bresnan is the largest MVPD, then MVPDs other than the largest one are the DBS providers and LightNex, which have a combined share of over 15%. On the other hand, if one of the DBS providers or LightNex is the largest MVPD, then Bresnan (which alone has over 15%) and the others combined have over 15%. See, e.g., *Time Warner Cable Inc.*, 25 FCC Rcd 14422, 14424, ¶ 6 (2010); *Charter Commun.*, 21 FCC Rcd 1208, 1210, ¶ 5 (2006).

¹⁷ Petition at 8 & Exh. 8. A zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

¹⁸ Petition at 9-10 & Exh. 6.

¹⁹ 47 C.F.R. § 0.283.

ATTACHMENT A

CSRs 7399-E, 8400-E, 8401-E, 8402-E, 8403-E, 8404-E, 8405-E, 8406-E, 8407-E, 8408-E, 8409-E,
8410-E, 8411-E, 8412-E, 8413-E, 8414-E

COMMUNITIES SERVED BY BRESNAN COMMUNICATIONS, LLC

| Communities | CUIDs | CPR* | 2000 Census Households | Estimated Competing Provider Subscribers |
|--------------------|--------|--------|------------------------|--|
| CSR 8399-E | | | | |
| Brush | CO0001 | 43.68% | 1836 | 802 |
| Fort Morgan | CO0018 | 40.37% | 3887 | 1569 |
| CSR 8400-E | | | | |
| Durango City | CO0002 | 17.21% | 5492 | 945 |
| La Plata County | CO0082 | 68.32% | 11021 | 7530 |
| CSR 8401-E | | | | |
| Grand Junction | CO0013 | 18.20% | 17865 | 3252 |
| Mesa County | CO0037 | 34.20% | 24148 | 8258 |
| CSR 8402-E | | | | |
| Buena Vista | CO0059 | 30.47% | 978 | 298 |
| CSR 8403-E | | | | |
| Canon City | CO0116 | 23.83% | 6164 | 1469 |
| CSR 8404-E | | | | |
| Montrose | CO0020 | 31.77% | 5244 | 1666 |
| CSR 8405-E | | | | |
| Rangely | CO0175 | 81.17% | 749 | 608 |
| CSR 8406-E | | | | |
| Sterling | CO0027 | 26.35% | 4604 | 1213 |
| CSR 8407-E | | | | |
| Bozeman | MT0002 | 18.86% | 10877 | 2051 |
| Gallatin County | MT0049 | 66.95% | 11557 | 7737 |
| CSR 8408-E | | | | |
| Butte | MT0001 | 21.46% | 14135 | 3033 |
| CSR 8409-E | | | | |
| Flathead County | MT0048 | 44.10% | 19817 | 8740 |
| CSR 8410-E | | | | |
| Great Falls | MT0019 | 17.97% | 23834 | 4283 |
| CSR 8411-E | | | | |
| Missoula | MT0028 | 18.38% | 24141 | 4438 |
| CSR 8412-E | | | | |
| Yellowstone County | MT0053 | 50.65% | 11966 | 6061 |

| Communities | CUIDs | CPR* | 2000 Census Households | Estimated Competing Provider Subscribers |
|--------------------|--------------|-------------|-------------------------------|---|
| CSR 8413-E | | | | |
| Laramie | WY0005 | 16.73% | 11336 | 1896 |
| CSR 8414-E | | | | |
| Gillette | WY0027 | 20.69% | 7390 | 1529 |

*CPR = Percent of competitive DBS penetration rate.